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13 *CREDIT PAYMENT SERVICES, INC.*

14 **IN THE UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

16 FLEMMING KRISTENSEN, individually,
and on behalf of a class of similarly situated
17 individuals,

18 Plaintiff,

19 v.

20 CREDIT PAYMENT SERVICES, INC.,
a Nevada corporation,
21 f/k/a MYCASHNOW.COM INC.,
ENOVA INTERNATIONAL, INC.,
22 an Illinois corporation,
PIONEER FINANCIAL SERVICES, INC.,
23 a Missouri corporation,
LEADPILE LLC,
24 a Delaware limited liability company, and
25 CLICKMEDIA, LLC d/b/a NET1PROMOTIONS
LLC, a Georgia limited liability company,

26 Defendants.
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) Case No. 2:12-CV-00528-APG (PAL)

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COMES NOW Defendant Credit Payment Services, (“CPS”), by and through its undersigned counsel and hereby submits these Suggestions in Support of its Motion for Summary Judgment.

INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”) was enacted to protect against “the proliferation of intrusive, nuisance calls.” *Mimms v. Arrow Fin. Servs.*, 132 S. Ct. 740, 744 (2012). The TCPA does not prohibit the transmission of all text message marketing to mobile devices, rather, the TCPA only prohibits transmission of text messages that violate its particular scriptures. *Id.*

Here, Plaintiff seeks relief on his behalf, and on behalf of a certified class of “[a]ll individuals who were sent a text message from telephone numbers ‘330-564-6316,’ ‘808-989-5389,’ and ‘209-200-0084,’ from December 5, 2011 through January 11, 2012.” Evidence gathered in discovery has demonstrated that the text messages at issue in this suit were not transmitted through an “automatic telephone dialing system” (“ATDS”) or a “predictive dialer,” as is required for TCPA liability.

Further problematic, the Class does not seek relief from the proper entities. The Class has not sued the entity that sent the complained-of text message. Nor has the Class sued the entity that provided their phone numbers to the entity that sent the text message. Instead, the Class has sued five entities that are one, two, and even three steps removed from the transmission of the message. In addition to being several layers removed, these entities did not control, contribute, or even know of the text message’s existence. The Class’s only tenuous connection to CPS is the purposefully convoluted and confused allegation that CPS worked with several other non-parties in a confined and seamless conspiracy. The evidence produced in this dispute has completely debunked this myth.

1 CPS is entitled to summary judgment on the Class' claims for TCPA violations. CPS
2 offers undisputed evidence that the text messages at issue in this case were not sent through an
3 ATDS or a predictive dialer, as required for TCPA liability. Furthermore, even if the Class can
4 demonstrate that the text messages were sent through an ATDS or a predictive dialer, the Class
5 cannot demonstrate that CPS is vicariously liable for the transmission of such messages. The
6 Court should therefore grant summary judgment in CPS' favor on all claims.
7

8 **STATEMENT OF UNCONTROVERTED FACTS**

9 1. CPS has never hired any party to transmit unsolicited text messages on its behalf.
10 *See*, Defendant CPS's Responses to Plaintiff Flemming Kristensen's First Set of Interrogatories,
11 dated December 12, 2012, Interrogatory 11 (Exhibit 1 to the Declaration of Gregory T. Wolf (the
12 "Wolf Decl."), attached hereto as Exhibit A¹); CPS' Answer to First Amended Complaint, ECF
13 38, ¶ 27.

14 2. CPS was not aware any text message had been sent to the Class until it was served
15 with this suit. Exhibit 2, CPS' Amended and Supplemental Answers to First Interrogatories from
16 Plaintiff, dated June 3, 2014, Interrogatory 7.

17 3. CPS contracted with Defendant LeadPile ("LeadPile") to receive "leads" regarding
18 potential customers who may be interested in loan products CPS serviced. Exhibit 3, Leadpile
19 Lead Buyer Agreement, dated August 13, 2009 (LEAD000001-4).

20 4. CPS was not aware LeadPile obtained leads through SMS text messages.
21 Exhibit 4, CPS Amended Answers to Second Interrogatories from Plaintiff, dated July 21, 2014,
22 Interrogatory 17.
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25 _____
26 ¹ Hereafter exhibit references to exhibits attached in support of this Memorandum in Support of
27 Motion for Summary Judgment refer to exhibits attached to the Wolf Decl., attached hereto as
28 Exhibit A.

1 5. CPS contractually required all vendors, including LeadPile, to comply with all
2 laws, including the TCPA. Exhibit 4, CPS' Amended Answers to Plaintiff's Second
3 Interrogatories, dated July 21, 2014, Interrogatory 18.

4 6. Defendant ClickMedia ("ClickMedia) contracted with non-party AC Referral
5 Systems LLC ("AC Referral") to send unsolicited text messages to the Class. Decl. of James Gee,
6 ECF 113-1, Exhibit C, ¶ 3.

7 7. AC Referral and the party from whom it received the phone numbers, 360 Data
8 Management, believed that all consumers associated with the phone numbers had opted-in and
9 consented to receiving text messages, which they confirmed by comparing the numbers to
10 suppression lists. Excerpts from Deposition Transcript of Michael Ferry, taken January 10, 2014
11 ("Ferry Depo."), 63:11-64:10, 67:16-68:9, 78:4-11, 89:16-22 (Exhibit 5); Excerpts from
12 Deposition Transcript of James Gee, taken January 23, 2014 ("Gee Depo."), 23:10-24:2, 53:3-24,
13 88:21-89:9 (Exhibit 6).

14 8. The contracts between AC Referral and ClickMedia obligated AC Referral to
15 comply with the TCPA. Exhibit 7, June 28, 2011 "Smart Credit Solution" Publishing Agreement
16 between Click Media and AC Referral (Depo. Exhibit 9); Exhibit 8, December 22, 2011 "Alliance
17 Capital" Publishing Agreement between Click Media and AC Referral (Depo. Exhibit 31).

18 9. In December 2011, AC Referral texted the Class. Exhibit 6, Gee Depo.,
19 125:3125:22; Exhibit 9, December 6, 2011 text message (330-564-6316) (Depo. Exhibit 34).

20 10. Other than the dollar amount included in the text message, which was provided by
21 Click Media, AC Referral alone controlled the content of the text messages; no other party had the
22 ability to review or approve the content of the text messages before they were transmitted. Exhibit
23 6, Gee Depo., 69:13-18; 188:21-189:3.

1 11. ClickMedia had no control over the transmission of the text message sent to the
2 Class. Exhibit 6, Gee Depo., 188:21-189:16.

3 12. Neither LeadPile nor CPS have ever conducted business with AC Referral. Exhibit
4 6, Gee Depo., 70:3-11.

5 13. Prior to the initiation of the instant action AC Referral was wholly unfamiliar with
6 LeadPile and CPS. Exhibit 6, Gee Depo., 70:12-20.

7 14. AC Referral used a computer software program called “Data Doctor” to transmit
8 the text message to the Class. Exhibit 6, Gee Depo., 30:8-20.

9 15. Data Doctor is a computer software program that, when connected to a cellular
10 phone via USB cable, can transmit text messages. Exhibit 10, Declaration of Michael Ferry dated
11 May 3, 2014 (“Ferry Decl.”), ¶ 5.

12 16. In order to transmit text messages using the Data Doctor system as it existed in
13 2011 and 2012, the system operator at AC Referral had to manually key in the phone number to
14 send the text message, or cut the phone number from a Word document, or other file, and paste it
15 into the text box. Exhibit 10, Ferry Decl., ¶ 8; Exhibit 6, Gee Depo., 31:8-20, 56:6-20, 131:10-18.

16 17. The system operator at AC Referral then had to hit “send” in order for any text
17 message to be transmitted using the Data Doctor program. Exhibit 6, Gee Depo., 149:24-150:3.

18 18. The system operator also had to monitor the Data Doctor program to correct for
19 anomalies or other errors that may occur during the transmission process. Exhibit 6, Gee Depo.,
20 150:9-151:5.

21 19. In 2011 and 2012, the Data Doctor program did not have the ability to produce
22 numbers sequentially. Exhibit 2, Decl. of M. Ferry, ¶ 10; Exhibit 6, Gee Depo., 130:23-131:3.

23 20. In 2011 and 2012, the Data Doctor program did not have the ability to produce
24 numbers randomly. Exhibit 6, Gee Depo. 130:17-22.

1 21. In 2011 and 2012, the Data Doctor program did not have the ability to store lists of
2 phone numbers to which it could later recall in order to transmit text messages to those numbers.
3 Exhibit 10, Ferry Decl., ¶ 13; Exhibit 6, Gee Depo., 56:25-57:14; 131:7-9.

4 22. The text message sent to the Class by AC Referral stated: “Do You Need up to
5 \$5000 Today? Easy Quick and All Online at: www.lend5k.com 24 Month Repay, all Cred. Ok
6 Reply Stop 2 End.” Decl. of James Gee, ECF 113-1, Exhibit C, ¶¶ 10-11; Exhibit 9, (Depo. Ex.
7 34).

8 23. The Lend5k.com website domain was owned, operated, and controlled solely by
9 AC Referral. Decl. of James Gee, ECF 113-1, Exhibit C, ¶¶ 6, 10.

10 24. If a consumer clicked on the Lend5k.com link in the text message, they would be
11 transferred to another website, which may have been owned by ClickMedia. Exhibit 6, Gee
12 Depo., 68:2-14, 124:5-22, 125:3-126:2, 165:14-18.

13 25. Plaintiff did not click on the link and has never visited Lend5K.com. Exhibit 11,
14 Excerpts from Deposition Testimony of Flemming Kristensen, taken January 21, 2014
15 (“Kristensen Depo.”), 73:1-9, 102:12-23, and 126:23-127:2.

16 26. CPS was not even aware that ClickMedia’s website existed at the time the text
17 messages were sent to the Class. Exhibit 12, CPS Amended Responses to Plaintiff’s First Request
18 for Admission from Plaintiff, dated July 21, 2014, Request 21-22.

19 27. At least 3,370 Class members somehow made their way to a Click Media operated
20 website after receiving the text message, where they entered their personal consumer information
21 to apply for a loan. Decl. of Shawn C. Davis, ECF. 113-3, ¶ 26.

22 28. At least 212 members of the putative class were ultimately sent to LeadPile’s
23 marketplace where their “lead” was purchased by a lender (although not necessarily CPS, Enova
24 or Pioneer). See Exhibit 13, analysis performed by Shawn Davis (Depo. Ex. 27).

1 29. Of the 212 Class members who were sent to LeadPile's marketplace, only 64 leads
2 were ultimately sold to various lenders. Exhibit 14, Declaration of Lisa C. Snow dated May 23,
3 2014 ("Snow Decl."), ¶ 24.

4 30. Only four of those leads were purchased by CPS. Exhibit 14, Snow Decl., ¶ 23.

5 31. CPS was not aware that the information it received from LeadPile had been
6 collected by ClickMedia. Exhibit 12, CPS Amended Responses to Plaintiff's First Request for
7 Admission from Plaintiff, dated July 21, 2014, Request 11, 17.

8 **I. SUMMARY JUDGMENT STANDARD**

9 Summary judgment is appropriate where there are no undisputed facts and the movant is
10 entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986);
11 Fed. R. Civ. P. 56(a). The moving party bears the burden of informing the court of the basis for its
12 motion and identifying the portions of the record that demonstrate the absence of a genuine issue
13 of material fact. *Celotex*, 477 U.S. at 323. In cases where the nonmoving party bears the burden
14 of proof at trial, as the Class does here, the moving party is entitled to judgment as a matter of law
15 if it can demonstrate that the non-moving party "failed to make a sufficient showing on an
16 essential element of [its] case with respect to which [the non-moving party] has the burden of
17 proof." *See id.* at 323-324.

18 Once the moving party has met its initial burden, the party opposing a motion for summary
19 judgment "must do more than simply show that there is some metaphysical doubt as to the
20 material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If a
21 party opposing summary judgment "fails to properly address another party's assertion of fact," the
22 Court may "grant summary judgment if the motion and supporting materials - including the facts
23 considered undisputed - show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(3).
24 Therefore, the non-moving party "may not rest upon mere allegations or denials in pleadings, but
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1 must set forth specific facts showing that there exists a genuine issue for trial.” *Anderson v.*
 2 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Far from a disfavored procedural shortcut,
 3 summary judgment is an integral part of federal procedure. *Celotex*, 477 U.S. at 323.

4 ARGUMENT

5 **II. THE CLASS CANNOT ESTABLISH THE SUBJECT TEXT MESSAGE WAS** 6 **SENT USING AN ATDS**

7 Section 227(b)(1)(A) of the TCPA bars the use of an “automatic telephone dialing system”
 8 (“ATDS”) to make calls (without prior consent) to certain telephone lines and numbers. In this
 9 case, the Class alleges they received unsolicited text messages on their cellular phones. Courts
 10 have concluded that a text message is a “call” as defined by the TCPA. See, e.g., *Satterfield v.*
 11 *Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

12 The TCPA defines an ATDS as equipment that has the capacity to store or produce
 13 telephone numbers to be called, using a random or sequential number generator, and to dial those
 14 numbers. 47 U.S.C. § 227(a)(1).

15 In 2003, the Federal Communications Commission (“FCC”), the federal agency tasked
 16 with interpreting and enforcing the TCPA (47 U.S.C. § 227(b)(2)), expanded the definition of
 17 ATDS to include “predictive dialers.” See *In re Rules & Regulations Implementing the TCPA*, 18
 19 FCC Rcd 14014 (FCC 2003). Predictive dialers are automated systems that call telephone
 20 numbers stored in databases. *Id.* at 14091. Thus, though predictive dialers do not technically
 21 “store or produce telephone numbers to be called, using a random or sequential number
 22 generator,” as required by Section 227(a)(1) of the TCPA, the FCC nonetheless concluded use of
 23 predictive dialers fell under purview of the TCPA. The FCC noted, and the Ninth Circuit has
 24 agreed, that the hallmark feature of an ATDS, whether it is an ATDS as defined by statute, or a
 25 predictive dialer as defined by the FCC, is that it has “the capacity to dial numbers without human
 26 intervention.” *Id.* at 14092; *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043
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1 (9th Cir. 2012). A device that cannot store or produce, then dial telephone numbers that have been
2 randomly or sequentially generated; or, a device that requires human intervention in order to place
3 a call, is clearly not an ATDS under the TCPA.

4 The Class fails to demonstrate that AC Referral used an ATDS to transmit the subject text
5 messages. AC Referral did not use equipment that operates as a random or sequential number
6 generator to send text message to the class members. A random or sequential number generator
7 refers to the ability to randomly, or sequentially, string together 10 numeric digits to produce
8 phone numbers. See, e.g., *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp.2d 723, 725
9 (N.D. Ill. 2011); *Dominguez v. Yahoo!, Inc.*, No. No. 13-1887, 2014 WL 1096051 (E.D. Pa. March
10 20, 2014). The uncontroverted evidence demonstrates that the Data Doctor program did not
11 randomly, or sequentially generate phone numbers. Statement of Uncontroverted Facts (“SUF”)
12 ¶¶ 19, 20. As such, there is no genuine, dispute of the fact that the Data Doctor program is not an
13 ATDS as defined by the TCPA. Likewise, there is no genuine, disputed material fact that the Data
14 Doctor program operated as a predictive dialer when it sent the text message to class members.
15 Instead, the text sent to the class members was sent by a live person. SUF ¶¶ 16, 17, 18.

16 In this manner, AC Referral’s actions are like the “human interaction” used in *Gragg v.*
17 *Orange Cab Col, Inc.*, 995 F. Supp.2d 1189, 1191 (W.D. Wash. 2014). In *Gragg*, the defendant
18 operated a taxicab dispatch center; after dispatch received a request for a taxi pick up, it would
19 send a text message notification to its customers. 995 F. Supp.2d at 1191. The system that sent
20 the text messages required an operator to press “enter” to transmit automatically created
21 notifications. *Id.* The Western District of Washington reviewed the actions of the dispatch system
22 and determined it did not constitute an ATDS as defined by the TCPA. *Id.* at 1194. Though the
23 *Gragg* court noted the “level of human agency involved in transmitting the text dispatch
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1 notifications” is minimal, nonetheless, it is “essential” to the operation of the system, such that the
2 system cannot be considered an ATDS. *Id.*

3 Likewise, here, though, arguably, the human interaction necessary to transmit text
4 messages through Data Doctor may be considered “minimal,” it is nonetheless necessary to utilize
5 the program. The AC Referral operator first had to key in the phone numbers to transmit the
6 messages, then hit “send” in order to transmit a text message through the Data Doctor program.
7
8 SUF ¶ 17. After that, the operator has to continue to monitor the program to ensure there were no
9 anomalies with the transmission. If such errors occurred, the operator had to correct them before
10 the text message would send. SUF ¶ 18. This is at least equivalent, if not more, than the human
11 agency used to transmit text messages in *Gragg*. Like in *Gragg*, this Court should conclude the
12 class has failed to demonstrate the text was transmitted by the ATDS. Demonstrating the text
13 message was sent through an ATDS is an element of the Class claim; therefore, failure to prove
14 this element is fatal to the Class’ claim as a whole. *See, e.g., Meyer*, 707 F.3d at 1043 (use of an
15 ATDS is an element of a TCPA claim); *Celotex*, 477 U.S. at 322 (summary judgment warranted if
16 party cannot establish existence of an element of its claim).

17 **III. THE CLASS’ VICARIOUS LIABILITY THEORIES CANNOT WITHSTAND** 18 **SUMMARY JUDGMENT**

19 The Class claims that CPS is vicariously liable for the conduct of AC Referral; however,
20 during the over two years this case has been pending the Class has continuously shifted their basis
21 for making this claim. *See, e.g., O’Banion v. Select Portfolio Servs., Inc.*, No. 1:09-cv-00249,
22 2011 WL 5572625 (D. Idaho Nov. 16, 2011) (defendants should not be required to respond to
23 continually moving targets). Regardless of which agency theory the Court applies, the Class’
24 vicarious liability arguments are not supported by the statute, general agency principals, or the
25 facts in this case, and summary judgment in CPS’ favor is therefore appropriate.
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1 **A. No Formal Agency Relationship Existed Between CPS and AC Referral.**

2 In its initial Class Action Complaint, the Class alleges that CPS “*directed* the mass
3 transmission of wireless spam to the cell phones nationwide of what it hoped were potential
4 customers of its payday loan products.” *See Class Action Comp.*, ECF 1, p. 15 (emphasis added).

5 After it became clear that CPS had no direct connection to AC Referral, the Class backed
6 off this position and amended its complaint to allege that CPS “*caused* the *en masse* transmission
7 of text messages to thousands of consumers’ cellular telephone numbers, including Plaintiff’s,”
8 seemingly relying on classical agency theory. *See First Am. Comp.*, ECF 35, ¶ 41 (emphasis
9 added); *see also* Exhibit 12, Plaintiff’s Amended Responses to Defendant CPS First Set of
10 Requests for Admission, Request for Admission 1. CPS has denied hiring any party to transmit
11 unsolicited text messages on its behalf. *See* SUF ¶ 1. Because neither CPS, nor LeadPile, the
12 party from whom it allegedly bought the leads, communicated with AC Referral, let alone had the
13 right to control the manner and means of AC Referral’s text message campaign, the Class’ agency
14 theory of liability fails. *See* SUF ¶¶ 1, 4, 12, 13; *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d
15 1079, 1084-1085 (C.D. Cal. 2012), *aff’d*, No. 12-56458, 2014 WL 2959160 (9th Cir. July 2, 2014)
16 (to succeed on a theory of vicarious liability theory, plaintiff must demonstrate that defendants
17 “controlled or had the right to control [the party who transmitted the text] and, more specifically,
18 the manner and means of the text message campaign they conducted.”).

19 To the extent the Class claims that CPS is vicariously liable for the actions of AC Referral
20 based on CPS’ purchase of leads from LeadPile, which it alleges had a contractual relationship
21 with Click Media, this claim also fails because Click Media could not control the content of the
22 text messages or the manner in which the text messages were sent. *See* SUF ¶¶ 10, 11. Control
23 over the content of the text messages and the manner in which they were sent belonged to AC
24 Referral alone, and for this reason summary judgment should be granted in favor of CPS. *See Mey*
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1 v. *Pinnacle Security, LLC*, 2012 WL 4009718 at *5 (N.D. W. Va. Sept. 12, 2012) (granting
 2 summary judgment in favor of defendant where evidence presented suggested that defendant did
 3 not have access to the records and/or the calls made by its lead generators, let alone control over
 4 the same, and lead generators used by defendant also outsourced lead generation to third parties
 5 with whom defendant had no relationship, finding that such facts “strongly indicate that
 6 [Defendant] plays a passive role in its interaction with lead generators,” and “[Plaintiff] has
 7 presented no evidence to suggest that [Defendant] has control over the means and manner by
 8 which its lead generators place calls on its behalf.”).

9
 10 **B. AC Referral Did Not Act with the Apparent Authority of CPS.**

11 After failing to demonstrate that CPS was vicariously liable for the transmission of the text
 12 messages under classical agency theory, the Class appears to now be relying on a theory that CPS
 13 had apparent authority over the text message campaign and/or ratified AC Referral’s conduct. *See*
 14 Plf. Mot for Class Certification, ECF 113, p. 16. In making this argument, the Class relies heavily
 15 upon a declaratory ruling from the FCC, in which the FCC observed that it does “not believe it
 16 appropriate to limit vicarious liability to circumstance of classical agency . . . Principles of
 17 apparent authority and ratification may also provide a basis for vicarious seller liability for
 18 violations of section 227(b).” *In the Matter of the Joint Petition Filed by DISH Network, LLC, the*
 19 *United States of Am., and the States of Cal., Ill., N.C., and Ohio for Declaratory Ruling*
 20 *Concerning the Tel. Consumer Prot. Act (TCPA) Rules*, 28 F.C.C. Rcd. 6574, 6590 n. 124 (2013).

21
 22 Even assuming apparent authority and ratification may provide a basis for vicarious
 23 liability under section 227(b), the Class’ claims fail. The Class has failed to demonstrate that
 24 apparent authority existed. In *Taco Bell*, the Ninth Circuit held apparent authority “can only ‘be
 25 established by proof of something said or done by the [alleged principal], on which [the plaintiff]
 26 reasonably relied.’” *Taco Bell Corp.*, 2014 WL 2959160 at *2 (citing *NLRB v. Dist. Council of*
 27
 28

1 *Iron Workers of Cal. & Vicinity*, 124 F.3d 1094, 1099 (9th Cir.1997); and Restatement (Second)
 2 of Agency § 265 cmt. a (1958) (“Apparent authority exists only as to those to whom the principal
 3 has manifested that an agent is authorized. There is, therefore, tort liability only if such a
 4 manifestation and its execution by the apparent agent results in harm.”)).

5 Here, the text message the Class received only identified a web address – lend5k.com.
 6
 7 SUF ¶ 22. After clicking on the hyperlink in the text message, a Class member would have been
 8 redirected to a website that may have been operated by Click Media; however there is no way to
 9 determine what the Class members saw as Plaintiff did not click on the hyperlink and the website
 10 is no longer maintained by AC Referral. Exhibit 6, Gee. Depo., 69:4-12, 124:10-12, 164:7-1654,
 11 SUF ¶¶ 23, 26. At least 3,370 Class members somehow made their way to a Click Media operated
 12 website after receiving the text message, where they entered their personal consumer information
 13 to apply for a loan. SUF ¶ 27. At least 212 of those Class members were ultimately sent to
 14 LeadPile’s marketplace, where “leads” for 64 of the Class members were purchased by a lender
 15 (although not necessarily CPS, Enova or Pioneer).² CPS only purchased four of the “leads.” SUF
 16 ¶¶ 28-30.

17
 18 To prevail, the Class would need to demonstrate that those Class Members who followed
 19 the lend5k.com hyperlink, or at least those four for whom CPS purchased leads, reasonably
 20 believed that AC Referral was acting with the authority of CPS, and that such belief was traceable
 21 to a manifestation of CPS, or its agents. See *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 13 C
 22 2018, 2013 WL 5346430 at *5 (N.D. Ill. Sept. 23, 2013) citing *In re DISH Network, LLC*, 28
 23 F.C.C. Rcd. at 6586 (“Apparent authority holds a principal accountable for the results of third-
 24

25
 26 ² The discrepancy between the numbers for Click Media and LeadPile further demonstrates that Click Media was
 27 not acting as an agent for LeadPile or CPS. Rather, Click Media was selling a product—lead data—a fraction of
 28 which was bought by LeadPile, and then sold to various parties including CPS.

1 party beliefs about an actor's authority to act as an agent when the belief is reasonable and is
2 traceable to a manifestation of the principal.”).

3 This could be accomplished with evidence that CPS, or its alleged upstream agents,
4 allowed AC Referral access to its customer databases, authority to use its trade name, trademark or
5 service mark, or that CPS, or its alleged upstream agents, wrote or reviewed the content of the text
6 message, or that CPS knew, or reasonably should have known, that AC Referral was violating the
7 TCPA and CPS failed to take effective steps within its power to force AC Referral to cease that
8 conduct. *See In re DISH Network, LLC*, 28 F.C.C. Rcd. at 6592 (indicating that an apparent
9 authority may be supported by evidence that “seller allows the outside sales entity access to
10 information and systems that normally would be within the seller’s exclusive control...the
11 authority to use the seller’s trade name, trademark and service markthat the seller approved,
12 wrote or reviewed the outside entity’s telemarketing scripts... [or that] the seller knew (or
13 reasonably should have known) that the telemarketer was violating the TCPA on the seller’s
14 behalf and the seller failed to take effective steps within its power to force the telemarketer to
15 cease that conduct.”).

16
17 It is undisputed that CPS was unaware that the text message had been sent until it was
18 served with the instant lawsuit, and it did not contract with or have any contact with AC Referral,
19 let alone allow AC Referral to use CPS’ trade name or trademarks, or allow AC Referral access to
20 its internal systems or the customer information, or take any other action which would appear to
21 cloak AC Referral with apparent authority to act on behalf of CPS. *SUF ¶¶ 1, 2, 4, 12, 13, 26.*
22 CPS was not even aware that the leads it received included information collected by Click Media
23 until the lawsuit was filed. *SUF ¶ 31.*
24

25 Summary judgment is appropriate because the Class cannot point to any fact in the record
26 to establish that Plaintiff, or any other member of the Class, believed the party who sent the text
27
28

1 message was acting on CPS' behalf or with CPS' approval. *See Avio, Inc. v. Alfoccino, Inc.*,
2 2:10-cv-10221, 2014 WL 1870108 at *12 (E.D. Mich. May 9, 2014) citing *Palm Beach Golf*
3 *Center—Boca, Inc. v. Sarris*, 981 F. Supp.2d 1239, 1253 (S.D. Fla. 2013) (granting summary
4 judgment in favor of defendants in TCPA junk fax case, holding that "Apparent agency cannot
5 apply here because there are no record facts establishing that Plaintiff believed [the party who sent
6 the junk fax] *was acting on Defendants' behalf*.").

7
8 To the extent the Class claims that CPS is vicariously liable for the actions of AC Referral
9 based on its alleged upstream connection to Click Media, summary judgment is also appropriate
10 because Click Media could not control the content of the text messages or the manner and means
11 of the text message campaign AC Referral conducted, and Click Media's contracts with AC
12 Referral mandated that AC Referral comply with all state and federal laws, including the TCPA.
13 *See* SUF ¶ 8.

14 **C. CPS Did Not Ratify the Conduct of AC Referral.**

15 The Class also appears to assert that CPS is vicariously liable for the transmission of the
16 text messages based on the fact it allegedly ratified the conduct of AC Referral by accepting a
17 monetary benefit from the calls, or by purchasing leads generated by the calls. *See* Plf. Mot for
18 Class Certification, ECF 113, p. 17. However, even assuming that CPS may have ratified the
19 actions of AC Referral by accepting a benefit for the four leads it purchased, a "[a] principal-agent
20 relationship is still a requisite, and ratification can have no meaning without it." *Taco Bell Corp.*,
21 2014 WL 2959160 at *2, citing *Batzel v. Smith*, 333 F. 3d 1018, 1036 (9th Cir. 2003). Because
22 CPS has no relationship, let alone a principal-agent relationship with AC Referral CPS cannot be
23 held liable for AC Referral's actions. SUF ¶¶ 12, 13.

24
25 Additionally, even if the Class could prove an agency relationship existed between AC
26 Referral and CPS (which CPS maintains it cannot do), to attribute liability to CPS, the Class
27
28

1 would need to establish that AC Referral was acting within the scope of its authority when it sent
2 the text messages. *See Uesco Industries, Inc. v. Poolman of Wisconsin, Inc.*, 993 N.E.2d 97, 112
3 (Il. App. 2013), *appeal denied* 996 N.E.2d 24 (Ill. 2013), *cert. denied* 134 S. Ct. 1323 (2014)
4 (holding a business could not be held vicariously liable for a violation of the TCPA that occurred
5 when an advertiser exceeded the scope of its authority by sending faxes to recipients outside of the
6 type of recipients that the business had contracted with advertiser to market its services to). It is
7 undisputed that the contracts in place between AC Referral and ClickMedia during the applicable
8 time frame specifically required AC Referral to comply with all federal, state and local
9 regulations, including but not limited to the TCPA. *SUF* ¶ 8. Likewise, CPS required all vendors
10 with which it contracted, to comply with all federal, state and local regulations. *See* *SUF* ¶ 5.
11 Accordingly, the Class cannot recover on a theory that CPS ratified the actions of AC Referral.
12 *See Avio*, 2014 WL 1870108 at *13 (granting summary judgment in favor of defendants, holding
13 “[t]he material facts show that Defendants neither hired [the third-party who transmitted the faxes]
14 with the intent of *violating* the TCPA, nor did they know (or reasonably should have known) that
15 [the third-party] was violating the TCPA on their behalf; rather, they hired [the third-party] with
16 the intent of *complying* with the TCPA.”).

17 CONCLUSION

18
19 For the foregoing reasons, CPS respectfully requests the Court enter Summary Judgment in
20 its favor and against the Class on all claims asserted and that the Court grant any other further just
21 relief.
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1 DATED: October 24, 2014

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14
15 **CERTIFICATE OF SERVICE**

16 Pursuant to FRCP 5(b), I certify that on October 24, 2014, I caused the above and
17 foregoing document entitled CREDIT PAYMENT SERVICES, INC.'S MEMORANDUM IN
18 SUPPORT OF MOTION FOR SUMMARY JUDGMENT to be served on all counsel of record
19 through the Court's CM/ECF system.
20

21
22 /s/ Gregory T. Wolf

23 An attorney for Credit Payment Services, Inc.
24
25
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